No. 14-1175

In the
Supreme Court of the United States

FRANCHISE TAX BOARD OF
THE STATE OF CALIFORNIA,
Petitioner,

v.

GILBERT P. HYATT,
Respondent.

On Writ of Certiorari to the Supreme Court of Nevada

REPLY BRIEF FOR PETITIONER

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November 23, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

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REPLY BRIEF

This suit, in which a private citizen has haled the sovereign taxing authority of California into Nevada state court against its will, has dragged on for seventeen years, imposing untold financial and dignity costs upon California. There is no end in sight—unless this Court reaffirms or reestablishes key principles of sovereign immunity.

Hyatt thoroughly abandons the equal-treatment principle he successfully advocated in *Hyatt I*. He now claims that Nevada is completely unfettered by federal law in deciding whether to give out-of-state sovereigns immunity in Nevada courts. Even as to core sovereign concerns as to which Nevada completely immunizes its sovereign actors, a sister State can be fully opened up to damages awards. Such a regime, with one State entirely at the mercy of another, seems purpose-built to produce the precise kind of friction among States that the Constitution was designed to eliminate. If that is truly what the law provides under *Nevada v. Hall*, 440 U.S. 410 (1979), then *Hall* cannot stand.

Hall should be overruled. The issue decided there is simply too fundamental to our constitutional design to tolerate an erroneous result that is irreconcilable with more recent, better-reasoned precedents. Hyatt concedes that, before the Framing, the States possessed sovereign immunity from suit in each others' courts. And he does not suggest that the ratification of the Constitution affirmatively destroyed that sovereign immunity. Instead, he posits a dichotomy between sovereign immunity "as a matter of comity" and sovereign immunity "as of right" and suggests that States possessed only the former in each

others' courts before the founding. But that is a false dichotomy. Outside a sovereign's own court system, what Hyatt terms sovereign immunity "as of right" could only exist *after* sovereigns joined together in a constitutional union. Such immunity "as of right" in each others' courts could not have pre-existed the founding, any more than State sovereign immunity "as of right" from suit in federal court could have pre-existed the Union. Thus, when this Court refers to States' retaining their pre-existing "sovereign immunity" and not being subject to suit in federal court unless the Constitution takes that sovereign immunity away, it is talking about what Hyatt tries to dismiss as sovereign immunity "as of comity."

Moreover, it is clear from Hyatt's conception of comity as entirely voluntary that, in his view, States now have no enforceable sovereign immunity in each others' courts whatsoever. None. Hyatt thus suggests that in joining together in a constitutional union designed to eliminate sources of friction among them, the States effectively sacrificed their sovereign immunity and created a dynamic where one State can allow its citizens to hale other States into its courts, thus guaranteeing friction.

Hyatt offers no explanation why a Nation sent into profound shock by the prospect of Georgia's being haled *into this Court* by a South Carolina citizen would have permitted Georgia to be haled into the decidedly less neutral *South Carolina* courts. If South Carolina had allowed such a suit and attempted to enforce a judgment against Georgia, the Union might not have survived its first decade. The far better view is that bedrock principles of sovereign immunity, preserved

by the plan of the Convention and enforceable by this Court, would bar such a suit.

Hyatt likewise offers almost no response to this Court's post-*Hall* sovereign immunity jurisprudence. Those more recent decisions undercut almost every pillar of *Hall*'s analysis. Even *Hall* acknowledged that a federal rule of law implicit in the Constitution would require a different result. The Court's post-*Hall* precedents recognize just such a rule.

Hyatt suggests that *Hall* does not interfere with the operation of State governments. But some 45 States—including Nevada itself—beg to differ. This case proves the point. While Hyatt lauds the decision below as a paragon of evenhandedness, it took FTB sixteen years (and untold taxpayer money) to obtain a decision that still leaves it (and California taxpayers) on the hook for $1 million with the prospect of retrial on a claim that previously netted Hyatt $85 million.

Finally, Hyatt suggests that States can attempt to recreate sovereign immunity through an elaborate multistate compact. But there already is a multistate compact that fully protects State sovereign immunity under these circumstances: the Constitution. That compact certainly allows the States to make mutual agreements to waive their sovereign immunity, but it does not obligate them to recreate what the plan of the Convention never took away.

ARGUMENT

I. A State May Not Refuse Sister States Haled Into Its Courts The Same Immunities It Enjoys In Those Courts.

Hyatt's view of the protection that federal law provides FTB underscores that his vision of sovereign immunity "as a matter of comity" is no sovereign immunity at all. Hyatt contends that neither comity, full faith and credit, nor equal sovereignty principles *require* Nevada to grant a sister sovereign involuntarily haled into Nevada courts the same immunities Nevada enjoys. Instead, Hyatt offers an effectively limitless rule: So long as a forum State is "'competent to legislate'" concerning a suit's subject matter, it is under no federal-law obligation to provide *any* immunity to a sister sovereign. Hyatt Br.43-44. And given the States' plenary power to legislate, Hyatt's proposed rule means that sovereign immunity "as a matter of comity" is sovereign immunity "in name only." Indeed, Hyatt emphasizes (at 50-52) that comity is entirely voluntary. Thus, under Hyatt's view, an out-of-state sovereign has no enforceable federal right to even a jot of immunity. That cannot be the law.

Despite having advocated an equal-treatment principle in *Hyatt I*, *see* J.A. 186, 195, 289, Hyatt now disparages it as a "jerry-built argument" seeking application of "*California's* law of absolute immunity above the amount of *Nevada's* cap on damages for *Nevada* officials." Hyatt Br.44. But FTB does not seek "to apply California's law of immunity," *id.* at 50; it seeks equal treatment through application of

Nevada's law of immunity, which includes a cap on compensatory damages.

Hyatt half-heartedly asserts that there is "no credible authority" to support FTB's proposed equal-treatment rule. *Id.* at 43-44, 46. But given the pre-*Hall* consensus that sovereign immunity precluded suits of this type altogether, it is a bit much to ask for deeply-entrenched precedent reflecting an equal-treatment limit on such suits. And, of course, this Court's sole relevant post-*Hall* decision, *Hyatt I*, embraced such a principle at Hyatt's urging. The equal-treatment rule is likewise supported by the Commerce Clause's non-discrimination principle and the Equal Footing Doctrine. FTB Br.19-20, 24.

Hyatt attempts to minimize *Hyatt I*'s distinction between permissible equal treatment and an impermissible "'policy of hostility'" toward a sister State. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488, 499 (2003). Hyatt would limit a "policy of hostility" to States' "closing their courthouses to foreign causes of actions entirely." Hyatt Br.47 & n.6. But *Hyatt I* embraced a broader concept of "hostility" that Nevada had avoided by acting "sensitively" and "rel[ying] on the contours of [its] own sovereign immunity from suit as a benchmark for its analysis." 538 U.S. at 499. Moreover, *Hyatt I* and sovereign immunity more generally are principally concerned about the sovereign *as defendant*, not whether the courthouse door is open to foreign causes of action or the sovereign *as plaintiff*.

Hyatt's concerns about administrability are misplaced. FTB's rule would not engender "endless, time-consuming inquiries" or introduce a need to

weigh competing state interests. Hyatt Br.45-46. It is a simple test: just take the home forum's well-developed law of sovereign immunity for home-state entities and extend it equally to out-of-state sovereigns. This case illustrates the simplicity of the equal-treatment rule. Nevada law capped compensatory damages against Nevada's agencies at $50,000, yet the Nevada Supreme Court refused to apply that cap to a California agency. Under an equal-treatment rule, Nevada must extend the cap to California agencies. Nothing more is required.

Nor does this bright-line rule mean that the Court must become a federal overseer of State comity decisions. *Id.* at 50-51. Once this Court firmly establishes the equal-treatment rule, there is no reason to think that state courts will not apply it faithfully. And to the extent a State occasionally strays, this Court's review has far more to recommend it than Hyatt's alternative, which all but guarantees simmering hostility between States.

Hyatt contends (at 53) that an equal-treatment rule would give each State a "voice" in determining the laws of every other State. Hyatt is mistaken. Under an equal-treatment rule, each State makes its own determination about the scope of sovereign immunity available in its own courts. Equal treatment means only that *if* a State decides to give immunity to its own officials and agencies, then a sister State haled into its courts receives at least that *same* immunity. The home State is in the driver's seat.[1]

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[1] Since California law would plainly provide immunity from Hyatt's suit, this Court can leave for another day whether a defendant sovereign that has waived its sovereign immunity in

Hyatt's effort to defend the Nevada Supreme Court's failure to "rely[] on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis," *Hyatt I*, 538 U.S. at 499, only underscores that the rule he advocates provides out-of-state sovereigns no protection whatsoever. Hyatt emphasizes that the Nevada court's departure from Nevada's own benchmark immunity law was justified because California's officials are not "subject to legislative control, administrative oversight, and public accountability *in Nevada*." Hyatt Br.47-48 (emphasis added) (quotation marks omitted). But a sister sovereign's agencies will never be subject to substantial legislative control and oversight *in Nevada*, so the decision below is a recipe for never providing comparable immunity to a sister sovereign. That is hardly the "healthy regard" for sister sovereigns envisioned in *Hyatt I*.[2]

At bottom, if *Hall* is to remain the law, there must be some federally-enforceable protection for

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its own courts would nonetheless receive the benefit of a host sovereign's more generous sovereign immunity rule. Equal sovereignty principles suggest that the answer is yes, so that a plaintiff who wants the benefit of a more generous waiver must sue that sovereign in its home courts. But there is no need to answer that question.

[2] Hyatt attempts to justify the Nevada Supreme Court's refusal to accord FTB equal treatment by emphasizing FTB's allegedly "bias-tainted campaign" against him. Hyatt Br.48; *see also id.* at 3-4, 49 n.7. But Hyatt's key witness on these points was a former FTB employee who had charged FTB with wrongful termination, subsequently provided "consultant services" to Hyatt's team, and backtracked on her inflammatory testimony. J.A.265, 268-270, 283-288.

sovereigns involuntarily haled into the courts of their sister sovereigns. The regime Hyatt champions—in which a defendant State receives only the immunity the forum State offers it as a matter of grace, no matter how much immunity the forum State reserves for itself—is no protection at all. Both common sense and well-established principles of equal treatment and equal sovereignty demand that a sister sovereign be treated at least as well as the home sovereign. Fealty to even more fundamental constitutional principles demands the overruling of *Hall*.

II. *Nevada v. Hall* Was Wrongly Decided And Should Be Overruled.

A. Hyatt Concedes that States Possessed Sovereign Immunity in the Courts of Other States at the Framing, and His False Dichotomy Between Types of Sovereign Immunity Is Unavailing.

1. Hyatt does not dispute that, at the Framing, the States possessed sovereign immunity from suit in the courts of other States. *See, e.g.*, Hyatt Br.26 (conceding the "fact of sovereign-to-sovereign immunity" at the Framing). Nor could he, for every shred of historical evidence confirms that proposition. The leading case so held. *See Nathan v. Virginia*, 1 U.S. (1 Dall.) 77, 78, 80 (1781) (dismissing case against Virginia in Pennsylvania courts because "all sovereigns are ... exempt from each other's jurisdiction"). The Framers recognized the principle. *See* FTB Br.32-33. And the swift passage of the Eleventh Amendment confirmed it. A populace shocked by the prospect of Georgia's being haled into this Court by a South Carolina citizen did not think

the South Carolina courts could entertain the action. *See id.* at 35-37. Hyatt does not question this straightforward proposition and, except for one passing reference, does not mention the Eleventh Amendment *at all*.

Given that the States plainly possessed sovereign immunity in other States' courts at the founding, Hyatt must show that States were dispossessed of this immunity "by the plan of the Convention or certain constitutional amendments." *Alden v. Maine*, 527 U.S. 706, 713 (1999). But Hyatt does not even attempt to make this showing. And all the available evidence—again, unrebutted by Hyatt—points firmly in the opposite direction. As Edmund Randolph explained, the Constitution "'confirms'" the pre-existing prohibition on States' entertaining suits against other States. FTB Br.33. Article III provided a neutral federal forum for suits between States and between an individual and another State because, as Randolph explained, to the extent "'a particular state can be a party defendant, a sister state cannot be her judge.'" *Id.* When the Eleventh Amendment withdrew that federal forum for individual suits against States, it reinforced that such disputes could not proceed in any forum—not in a neutral federal forum and, *a fortiori*, not in the less-neutral courts of the citizen's home State. *Id.* at 46-47; *New Hampshire v. Louisiana*, 108 U.S. 76, 91 (1883) ("The evident purpose of the amendment, so promptly proposed and finally adopted, was to prohibit all suits against a state by or for citizens of other states[.]").

2. Forced to concede both the fact of interstate sovereign immunity at the Framing and that the plan

of the Convention only confirmed that immunity, Hyatt essentially concedes his case. Undeterred, he attempts to deprive those concessions of their fatal sting by positing that there are two variants of sovereign immunity—immunity "as a matter of comity" and immunity "as of right"—and that, in each others' courts, States only ever enjoyed, and the Constitution only preserved, the former. This convoluted theory is profoundly misguided.

To begin with, Hyatt's proposed dichotomy between immunity "as a matter of comity" and immunity "as of right" is spurious. At best, it confuses questions of how sovereign immunity is enforced with whether and "what type" of sovereign immunity exists. To be clear: sovereign immunity from suit is an inherent attribute of sovereignty; all sovereigns possess it. *See Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2039 (2014); *Sossamon v. Texas*, 131 S. Ct. 1651, 1657 (2011). And before the plan of the Convention was ratified, the States clearly possessed this sovereign immunity from suit, including immunity from suit in the courts of their sister sovereigns, and not just some junior-varsity variant of sovereign immunity.

If, before ratification, South Carolina had allowed one of its citizens to hale Georgia into South Carolina court over Georgia's objection, there is no question that action would have violated Georgia's sovereign immunity. No one would have said that South Carolina did not violate Georgia's sovereign immunity because Georgia enjoyed only "sovereign immunity as of comity" and South Carolina declined to extend comity. Putting to one side what Georgia would do in

response to that obvious affront to its sovereignty and dignity, there is no question that South Carolina's action would have been understood to violate Georgia's sovereign immunity. Every member of the Framing generation would have recognized as much.

Thus, speaking of whether States possessed "sovereign immunity as of right" or "sovereign immunity as a matter of comity" at the Framing is inapt. The States possessed sovereign immunity—full stop. But the problem with Hyatt's suggested dichotomy runs deeper still. Hyatt appears to demand that FTB demonstrate that States enjoyed "sovereign immunity as of right" *before* the Framing. But, as to any courts but a sovereign's own, the very notion of "sovereign immunity as of right" presupposes a binding legal relationship among sovereigns that only the Constitution could provide. Independent nations must rely on comity, whereas States within the Constitution can demand that certain aspects of their sovereignty be protected as a matter of right. By demanding that States demonstrate pre-ratification "sovereign immunity as of right" in each others' courts, Hyatt quite literally demands the impossible. He might as well demand a unicorn. If his conception of what a State must demonstrate to have an enforceable federal right to sovereign immunity were correct, then no State would enjoy any enforceable right to sovereign immunity in any courts but its own, yet a host of this Court's cases are to the contrary.

Indeed, the impossibility of pointing to immunity "as of right" that pre-existed the Constitution is even more obvious with respect to the States' immunity in the federal courts. Because the Constitution created

those federal courts, demanding proof of a pre-existing immunity from suit in those courts would demand the impossible. And since federal courts are courts of a distinct, superior sovereign, any analogous pre-constitutional sovereign immunity States possessed would necessarily be what Hyatt terms sovereign immunity "as a matter of comity." Thus, when this Court's cases ask whether a State enjoyed sovereign immunity from comparable suits at or before the Framing, they do not demand sovereign immunity "as of right." Sovereign immunity "as a matter of comity"—or, more to the point, sovereign immunity *simpliciter*—suffices to shift the burden to the plaintiff to show that the sovereign immunity was eliminated by the plan of the Convention (a burden Hyatt does not even try to carry).

Hyatt's demand for pre-existing sovereign immunity "as of right" also would mean that States have no enforceable federal protection against being sued by their sister States in state court. If, before the Framing, Massachusetts purported to sue New York in Massachusetts court, every Framer would have recognized it as a violation of New York's sovereign immunity. But that sovereign immunity would not have been "as of right." New York would have needed to depend on Massachusetts to recognize New York's undoubted sovereign immunity.[3] Thus, under Hyatt's logic, if Massachusetts files such a suit today, New

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[3] Put differently, Massachusetts had the raw power to disregard New York's sovereign immunity, but not the right to do so. And the raw power to deny immunity and provoke a diplomatic crisis with a sister State is not a power that is compatible with the plan of the Convention.

York just has to hope Massachusetts voluntarily extends sovereign immunity. That is nonsense. It is plain that New York has an enforceable federal right to insist that Massachusetts respect its sovereign immunity and bring an original action in this Court or no action at all. The same would have been true before the Eleventh Amendment if Chisholm had sued Georgia in South Carolina state court. At a minimum, Georgia could have insisted that the suit be brought in this Court or not at all. And when the Eleventh Amendment eliminated the possibility of bringing the suit here, it did not somehow eliminate Georgia's undoubted immunity from being haled into South Carolina court by Chisholm.

3. At bottom, Hyatt conflates the means of enforcing sovereign immunity and the existence of sovereign immunity in the first place. While the latter is what matters, Hyatt's vision of how States' "sovereign immunity as of comity" would actually be enforced only underscores his argument's flaws. Before the States joined together in the Union, they could redress a violation of their sovereign immunity through the tools available to independent sovereigns. Thus, South Carolina's hypothetical affront to Georgia's sovereignty and dignity would have precipitated diplomatic negotiations, enforcement of treaties, or outright war. *See, e.g.*, James E. Pfander, *Rethinking the Supreme Court's Original Jurisdiction in State-Party Cases*, 82 Cal. L. Rev. 555, 583 & n.105 (1994). The States largely agreed to cede those diplomatic and military options as part of the plan of the Convention. *See* U.S. Const. art. 1, §10 (prohibiting States from entering into treaties, imposing import duties, or engaging in war). Thus,

Hyatt's position leads to the untenable conclusion that the States have no meaningful ability to prevent a sister sovereign from blatantly disregarding their core sovereign immunity and cannot stop that sister sovereign from entering a judgment against them at the behest of a private citizen.

Hyatt conveniently omits any discussion of how a judgment entered in obvious derogation of a State's sovereign immunity would be enforced. Pre-ratification, one option for Georgia in responding to the hypothetical South Carolina state-court judgment would be to dare South Carolina to try to enforce it. But even post-ratification, there is no obvious mechanism for enforcement. It is inconceivable that the Framers, dedicated to eliminating the unenforceable judgments and simmering disputes that bedeviled the Articles of Confederation, *see generally* Bradford R. Clark, *The Eleventh Amendment and the Nature of the Union*, 123 Harv. L. Rev. 1817 (2010), would have sanctioned a variant of sovereign immunity that all but guaranteed unenforceable judgments and long-simmering disputes. A vision of the "Union" in which one State seizes the neighboring State university's team bus during a football game to satisfy an unpaid judgment is not a happy one, and it was not the Framers' vision. The Framers envisioned that the States' pre-existing sovereign immunity from suit in each others' courts would be enforced the same way as all other aspects of State sovereign immunity that survived the plan of the Convention: as a federal right enforceable in this Court. *See, e.g., Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 747 (2002); *Alden*, 527 U.S. at 712.

4. Hyatt relies heavily—indeed, almost exclusively—on *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), and subsequent law-of-nations decisions by this Court. But those cases do not help him. *Schooner Exchange* and later decisions hold that, under law-of-nations doctrine, there are circumstances in which one independent sovereign can exercise jurisdiction over another independent sovereign. The problem for Hyatt, however, is that none of those circumstances is present here, and even Hyatt's own cases acknowledge the existence of core intrusions upon sovereign immunity that constitute violations of the law of nations justifying diplomatic or military response. *See, e.g., id.* at 143. And at the Framing, one State's exercise of jurisdiction at the behest of one of its citizens over another State indisputably *was* considered one of those core affronts to sovereignty. *See Nathan*, 1 U.S. (1 Dall.) at 77 (agreeing that "every kind of process, issued against a sovereign, is a violation of the laws of nations; and is in itself null and void."); FTB Br.32-33.[4]

What is more, the law-of-nations principles that govern relationships among fully independent sovereigns have little relevance to how the States' sovereign immunity is to be protected post-ratification. All concede that States had sovereign

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[4] Hyatt notes (at 22) that the Pennsylvania Attorney General supported Virginia's claim of immunity in *Nathan*, which no doubt reflects the reality that with independent nations, the executive branch bears the brunt of the diplomatic affront caused by the courts' disregard of another sovereign's immunity. Post-ratification, state executive officials no longer have diplomatic duties, but it is telling that Nevada's Attorney General supports FTB's claim of immunity.

immunity from suits like this pre-ratification, and no one thinks that enforcement of that sovereign immunity post-ratification is guided by law-of-nations principles, such that California can withdraw diplomats or declare war. As Justice Iredell recognized in his dissent in *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), later vindicated by the Eleventh Amendment: "No part of the Law of Nations can apply to this case ... since unquestionably the people of the United States had a right to form what kind of union, and upon what terms they pleased, without reference to any former examples." *Id.* at 449.

Schooner Exchange, which addressed relations between the United States and France, obviously had no need to address any of these considerations unique to the States at the Framing. And it certainly did not address whether the Constitution permits one State to involuntarily hale another State into its courts. That is why, for nearly two hundred years after the Framing—and notwithstanding *Schooner Exchange*—state courts and this Court universally believed that the Constitution prohibited this practice. *See* FTB Br.37-39. And that is why, in the 167 years between *Schooner Exchange* and *Hall*, *not one decision* in state or federal court cited *Schooner Exchange* as even relevant to the issue. Only in *Hall* did this Court abruptly change course by—like Hyatt—erroneously relying on *Schooner Exchange*.[5]

Finally, even *Hall* conceded that "when *The Schooner Exchange* was decided, or earlier when the

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[5] No party nor any of the lower-court decisions in *Hall* cited *Schooner Exchange*. *See* FTB Br.42, 48 & nn.13 & 15.

Constitution was being framed," one State could not be involuntarily haled into the courts of another State. 440 U.S. at 417. *Hall* admitted that if there were "a federal rule of law implicit in the Constitution" requiring adherence to that Framing-era "sovereign-immunity doctrine," the States would be bound by it and could not exercise jurisdiction over each other in their courts. *Id.* at 418. Thus even if Hyatt were correct about the relevance of *Schooner Exchange* to the question, that only gets him so far as *Hall*'s search for a "federal rule of law implicit in the Constitution." And while *Hall* failed to identify such a rule, both the analysis detailed above and this Court's more recent, better-reasoned sovereign immunity precedents make clear that there is an enforceable federal rule that guarantees the States the sovereign immunity they enjoyed at the Framing.

B. *Hall* Cannot Be Reconciled With This Court's More Recent, Better-Reasoned Precedents.

The Court's post-*Hall* jurisprudence confirms that *Hall*—incorrect the day it was decided—cannot survive. These precedents have rejected almost every rationale on which *Hall* was based. Since *Hall* was decided, State sovereign immunity is now recognized as a "fundamental postulate[] implicit in the constitutional design," *Alden*, 527 U.S. at 729, and a "presupposition of our constitutional structure," *Blatchford v. Native Vill. of Noatak & Circle Vill.*, 501 U.S. 775, 779 (1991). The Court has repeatedly acknowledged the "structural understanding" that "States entered the Union with their sovereign immunity intact" and "retained their traditional

immunity from suit, 'except as altered by the plan of the Convention or certain constitutional amendments.'" *Va. Office for Prot. & Advocacy v. Stewart*, 131 S. Ct. 1632, 1637-38 (2011) (quoting *Alden*, 527 U.S. at 713). As such, in determining "the scope of the States' constitutional immunity from suit," the Court looks to "'history and experience, and the established order of things,'" which "reveal the original understanding of the States' constitutional immunity from suit." *Alden*, 527 U.S. at 726-27. The reasoning of these decisions not only thoroughly undermines the foundation of *Hall*, but also supplies the "federal rule of law implicit in the Constitution" that *Hall* believed missing.

Hyatt barely acknowledges these precedents. When he does, he contends only that they "address[ed] quite different questions about the States' immunity in federal tribunals and their own courts." Hyatt Br.35. But suits in federal courts and suits in another State's courts are similar in the relevant respects. In both cases, States enjoyed immunity from comparable suits before ratification. In both cases, States cannot rely on their power over their own state courts to ensure that their sovereign immunity is protected. And in both cases, States are not reduced to the only means of enforcement available in other courts pre-ratification (*i.e.*, via comity and diplomacy), but have an enforceable immunity of constitutional dimension (*i.e.*, via the "federal rule" deemed both critical and absent in *Hall*).

Hyatt maintains that none of the Court's more recent decisions "discussed, let alone disavowed, the principles of *Schooner Exchange*." *Id.* at 12. Just so.

But that only underscores that *Schooner Exchange* is irrelevant to the question at hand. Indeed, even *Hall* recognized that it need not "disavow[]" *Schooner Exchange* (which governed relationships between independent sovereigns) if it identified a "federal rule of law implicit in the Constitution" to govern the sovereign immunity of the States of the new Union. That rule—that States enjoy their pre-existing sovereign immunity as an enforceable federal constitutional right that cannot be displaced even by a federal statute, unless the immunity is inconsistent with a specific constitutional provision or the plan of the Convention—is what these more recent cases provide, in spades.

The Court's more recent decisions also answer Hyatt's complaint (at 34) that FTB's evidence and arguments mirror those in Justice Rehnquist's *Hall* dissent. The same could be said for virtually every one of this Court's post-*Hall* sovereign immunity decisions.

Hyatt effectively concedes that his position would result in multiple doctrinal anomalies. First, it would undercut *Alden*, which held that States are shielded from federal-law suits in their own courts by sovereign immunity of a constitutional dimension that Congress cannot abrogate via Article I powers. Under Hyatt's theory, the plaintiffs' mistake in *Alden* was suing Maine in Maine state court. If only they had sued Maine in New Hampshire state court, Maine would have no federally enforceable immunity to invoke. Second, even if Maine were somehow immune from such a federal-law suit in New Hampshire court, it would nonetheless be subject to suit under New

Hampshire law in New Hampshire court. Thus, a State cannot be bound by supreme federal law, but can be bound by a sister State's law. That is a "tremendous anomaly," as Justice Breyer rightly observed during the *Hyatt I* oral argument. *See* J.A.182. Third, as Justice Kennedy noted in that same argument, it is "very odd," to say the least, to conclude that a State "can't be sued in its own courts and it can't be sued in a federal court, but it can be sued" in a sister State's courts, which have "the least interest in maintaining the dignity of" the defendant State. J.A.180-181; *see also* FTB Br.49-50 (noting scholars' similar views). Fourth, as Hyatt does not dispute, preserving *Hall* would mean that Indian tribes enjoy broader immunity than States, despite the "qualified nature of Indian sovereignty." *Bay Mills*, 134 S. Ct. at 2030-31; FTB Br.48.

C. Hyatt's Remaining Arguments Do Not Save *Hall*.

Hyatt claims, remarkably, that despite exposing sovereign States to suit without their consent and threatening them with crushing liability, *Hall* "is of little importance to effective operation of state governments." Hyatt Br.36. At least 45 States beg to differ. *See* States' Br.21-31; S.C. Br.2-4, 17-20; *see also* Br. of Council of State Governments *et al.*16-20. While this suit is an especially egregious example, suits against non-consenting sovereign States in sister States' courts are nowhere near as "rare" as Hyatt imagines. *See, e.g.*, States' Br.23-26. All of these suits threaten the dignity and respect of the sovereign State and seek either money from the State treasury or changes to State policy, dictated by out-of-state juries

and judges.[6] Indeed, multiple suits have recently been filed against FTB in other States. *See* FTB Br.52. State taxing authorities like FTB are a particularly easy target for lawsuits, given their inherent unpopularity. It is not difficult for a disgruntled taxpayer to obtain local jurisdiction over an out-of-state taxing authority. Multistate Tax Comm'n Br.6-8. Yet, as Hyatt's own case demonstrates, such suits have an especially pernicious impact on the fundamentally sovereign function of tax collection, and they disrupt the multistate cooperation that is essential to enforcement of state taxes. *Id.* at 8-21.

Hyatt also insists that the "doctrine of comity" provides sufficient protection to States, pointing to the fact that the Nevada Supreme Court did grant *some* protections to FTB. Hyatt Br.35; *see also id.* at 15, 37, 47-48. But this only underscores the utter arbitrariness and unpredictability the States must endure under *Hall*. Make no mistake, Hyatt's position is that the modicum of sovereign immunity afforded by Nevada was entirely a matter of grace. It was neither an entitlement dictated by the scope of Nevada's waiver of sovereign immunity for its own state agencies, nor predictable based on the contours of that waiver or anything else. And FTB needed to spend sixteen years in litigation—expending untold

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[6] Even suits that do not proceed to final judgment have these undesirable consequences. For example, Nevada recently settled a suit against it in the California courts by agreeing to pay $400,000 and to alter state policy. *See* FTB Br.55; Janie Har, *San Francisco OKs Patient-Dumping Lawsuit Settlement*, Associated Press, Oct. 27, 2015, http://perma.cc/7uy4-xc8y.

amounts of time, effort, and taxpayer money—just to secure that small measure of protection.

Hyatt further contends that there is no need to overturn *Hall* because States could "enter into bilateral or multilateral agreements to provide immunity in each others' courts" or petition Congress to resolve the problem. *Id.* at 37-41. But the States already entered into a multilateral agreement to provide federally-enforceable rights to immunity—namely, the United States Constitution. There is no need for them to meet again to protect sovereign immunity that pre-existed the Constitution and was not altered by that document, but only confirmed by both the unamended Constitution and the Eleventh Amendment.

While Hyatt is correct that there is room under our Constitution for States to negotiate over the circumstances in which they are subject to suit in each others' courts, he gets the default rule exactly backwards. There is a long tradition of sovereigns agreeing to waive their sovereign immunity in their own courts or in each others' courts as a matter of mutual consent. There is no comparable tradition of assuming that the States have waived their pre-existing sovereign immunity by entering the Union and forcing them to recapture that immunity through a new multistate compact.

Hyatt mistakenly suggests that overruling *Hall* would leave individuals "without any redress" against States. Hyatt Br.40; Professors' Br.13-14. But the Court has heard similar complaints before and has found the possibility insufficient to trump sovereign immunity preserved and guaranteed by the

Constitution. If the need for a remedy could not overcome the constitutional basis for immunity when it comes to suits in the defendant State's own courts or the neutral federal courts, it should not suffice to create remedies in *another* State's courts, which have "the least interest in maintaining the dignity of" the defendant State. J.A.180-181.

Moreover, as a practical matter, Hyatt possesses, and is pursuing, avenues for judicial recourse in the California courts. While FTB has understandably not opened itself up to tort suits like this, Hyatt is challenging FTB's audits and assessments in administrative proceedings and will have the opportunity to challenge them in California courts. *See* FTB Br.5 & n.3. California law also provides a cause of action in the California courts against FTB for the alleged breaches of confidentiality and privacy underlying his suit. *See, e.g.*, Cal. Civ. Code §1798.45. It further provides a cause of action against "any officer or employee" of FTB who "recklessly disregards board published procedures." Cal. Rev. & Tax Code §21021(a). Those partial waivers of sovereign immunity are a product of legislative judgment, not judicial whim, and they make clear that Hyatt is not without a remedy in California court.

Hyatt does quite emphatically lack a remedy in Nevada court. Like Chisholm before him, Hyatt cannot hale an unconsenting sovereign into court against its will. Indeed, not even Chisholm thought the appropriate reaction to the Eleventh Amendment was to sue Georgia in South Carolina court. That *Hall* would have permitted Chisholm's state-law suit is a testament that it was incorrect the day it was decided.

Stare decisis is not an inexorable command, and the relevant considerations cannot save *Hall*. There are no meaningful reliance interests on *Hall*, and subsequent decisions have undermined its foundations and have proved the decision anomalous, unworkable, and plainly erroneous. If ever there were a "special justification" for overturning a precedent, it is present here. The issue at hand is too important to our basic constitutional structure to leave *Hall*'s manifest error uncorrected.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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November 23, 2015